Supreme Court, U.S.
FILED

No. 041522 MAR 5 2005

IN THE

Supreme Court Of The United States

A. ROBY LAL,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE
COMMONWEALTH COURT OF PENNSYLVANIA,
BOROUGH OF MODENA

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May 7th, 2005

QUESTIONS PRESENTED

1. Was the Petitioner denied the due process of law guaranteed to him by the United States Constitution when he was prosecuted by a Borough for offenses he did not commit and offenses which were legislatively constituted "misdemeanors under the Borough Ordinance rather than summary offenses in violation of the enabling Pennsylvania legislation which provided that boroughs of the State were limited to legislating conduct as summary offenses under its ordinances and by implication prohibited from creating misdemeanors under its ordinances?

2. Was the Petitioner denied the equal protection of the laws guaranteed to him by the United States Constitution when he was singled out for prosecution because of his membership in a minority group by a borough council president who had no authority to issue citations against him because of the conflict of interest inherent in the elective office of borough president needing revenue which was easily obtainable through fines and the duties of a code officer.

3. Was the Petitioner denied the due process of law guaranteed to him by the United States Constitution (a) when the trial judge imposed maximum fines on each citation without the petitioner having the benefit of a jury trial, (b) when the judge dismissed the Petitioner's appeal without disposing of pre-trial motions and on the pretense of his presence at the hearing even though he was represented by an attorney and by a representative who assisted him in managing the property involved, and (c) when the trial judge did not follow the proper procedure for a contempt finding instituted by appellate courts, and (d) when respondent Pennsylvania failed to consolidate all pertinent citations for trial as required by law.

PARTIES

The caption contains the name of all parties to the proceeding below.

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005

A. Roby Lal, Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
(BOROUGH OF MODENA), Respondent

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioner, A. Roby Lal, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Commonwealth Court of Pennsylvania, with respect to which the Supreme Court of Pennsylvania denied allowance of appeal, including, without limitation, the order of the Supreme Court of Pennsylvania denying consolidation of two proceedings which are the subject of this petition for a writ of certiorari and a companion proceeding. The state court proceedings involved citations brought by the Borough of Modena, Chester County, Pennsylvania against the petitioner involving his one property in the Borough.

OPINIONS BELOW

The opinion and order of the Commonwealth Court of Pennsylvania and the order of the Supreme Court of Pennsylvania appear in Appendix A and Appendix B to this Petition.

JURISDICTION

A petition for allowance of appeal from the Order of the Commonwealth Court of Pennsylvania was denied by the Supreme Court of Pennsylvania by Order dated October 14, 2004. Upon Application No. 04A679, this Court granted an extension of time to file this Petition for a Writ of Certiorari by March 6, 2005. A petition was filed in a timely manner, but it covered two separate proceedings and the Court allowed the petitioner to refile splitting the petition into two separate cases. The court extended the period to May 9, 2005. This Court's jurisdiction is invoked under Title 28, U.S.C. # 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. 5
U.S. Const., Amend. 6
U.S. Const., Amend. 8
U.S. Const., Amend. 14

Appear in Appendix D.

In addition the following statutory provisions are particularly relevant:

53 P.S. 48307
65 P.S. 13

STATEMENT OF THE CASE

Petitioner is a physician owned a rental property in a small Borough of Modena Pennsylvania with a population of around 600 inhabitants. He was assisted by his father, Amrit Lal, an experienced real estate manager, in managing the property. Petitioner had made several repairs, improvements and renovations since his acquisition in 1993 to make it suitable for residential use. The Borough was in dire need of revenue and it selectively targeted petitioner for the purpose of raising revenue through the writing of citations. The citations were written by the Borough Council

President (Mr. Groce) who did not have legal authority under the Pennsylvania law to write citations. Mr. Groce would sit at home and write the citations and add the dates in sequence and then file them with the local municipal court.

On or about December 16, 2001, Mr. Groce went to the property of the petitioner and wrote items of deficiency which need to be corrected. Petitioner arranged for a contractor to immediately attend to urgent matters and repairs which he did. Without providing a reasonable period of time, Mr. Groce immediately started writing citations. Within two (2) weeks of Mr. Groce's visits, the house became a victim of mystery fire on December 29, 2001 in which two small kids perished. Because of this tragedy, neighbors and well-wishers left flowers, toys, cards of sympathy in memoriam. Petitioner and his father who had looked after the property did not want to disturb the sanctity of this rural setting which had become a temporary shrine of sympathy, sadness and sorrow.

Soon thereafter, Mr. Groce wrote to petitioner's father that the property needed to be cleaned up. Petitioner was not certain whether the balance of the home could be saved. Upon contacting building developers and demolition contractors, it was discovered that it would be an expensive proposition to save and rehab the building. Bids were therefore sought for demolition and a contract was signed for demolition in March 2001. A copy of the contract was sent to Mr. Groce and the demolition contractor was requested to obtain whatever permits are needed and stay in touch with Mr. Groce. The demolition contractor had to obtain various types of permits (State Highway Department, Telephone Company, Electric Company etc.) prior to renting heavy equipment machinery to demolish the building and clean up the site. All this was accomplished in early May 2002. Mr. Groce, without proper and prior notice, again started writing citations from April 3 to April 18, 2002 on the pretense that the building had not been demolished by the petitioner within sixty (60) days.

On September 17, 2002, the local district court imposed a fine of $100.00 each on the fourteen citations without regard to the mitigating and exceptional circumstances of the situation. For that reason, a timely appeal was filed to the Chester County Common Pleas Court where it was vainly hoped that the respondent State of Pennsylvania through its attorney (the borough solicitor) would consolidate the two sets of citations as required by 18 Pa.C.S. 110. Upon appeal the Common Pleas Court after a hearing without jury increased the fine from $100.00 to $1000.00 on each citation without any aggravating circumstance. The Commonwealth Court of Pennsylvania affirmed the order of the trial court by Order and Opinion dated March 16, 2004.

A timely petition for allowance of appeal addressed to the Supreme Court of Pennsylvania was denied by Order dated October 14, 2004.

REASONS FOR GRANTING THE WRIT

A. FOURTEENTH AMENDMENT VIOLATIONS OF DUE PROCESS

For the most part, the reasons for granting the writ are the same in both this matter and the companion matter. It is apparent that there was arbitrary and oppressive use of police powers by Pennsylvania acting through the officials of the Borough of Modena in mistreating the petitioner. It may be inferred that these fourteenth amendment violations are germane to the national origin and Asiatic-Indian status of the petitioner, even though he is a U. S. citizen by birth.

The protection afforded by the Bill of Rights of U.S. Const. must be given by the States under U.S. Const., Amend. 14. Klopper v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). A provision of the Bill of Rights which is "fundamental and essential to a fair trial: is made obligatory on the States by the Fourteenth Amendment." Gideon v. Wainwright, 372 U.S. 535, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). See also, Pointe v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923

(1965).

In addition to being obliged to provide Fifth Amendment due process, the states are directly obliged to provide due process and equal protection of the laws by the Fourteenth Amendment. In Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 4 S.Ct. 663, 28 L.Ed. 569 (1884), the court said (at p. 707 of 111 U.S.) with respect to the meaning of due process:

"What constitutes that process it may be difficult to define with precision so as to cover all cases....It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

In Handi v. Rumsfeld, 124 S.Ct. 2633, 159 L.Ed.2d 78 (U.S. 2004), this Court discussed the procedures it uses to determine whether a citizen is being deprived of "life, liberty, or property without due process of law" as guaranteed by U.S. Const., Amend. 5. Under Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) the Court determines the private interest which is affected by the official action against the asserted governmental interest and the governmental burdens in providing greater process.

(i) Petitioner was issued citations against his property by an elected official to the Borough council who had no legal authority to write the citations. A motion to dismiss all the citations was made due to the dual and conflicting functions of the Borough Council President and a code enforcement officer. On February 25, 2003, the date of the hearing on appeal in the Common Pleas

Court, counsel for the petitioner filed a motion to dismiss the proceedings.

This pretrial motion to dismiss all the citations went to the underlying legality of the proceedings against the petitioner because it challenged the authority of the code officer to act in dual capacity. The motion made by petitioner's attorney alleged that there was incompatibility in fact between the office of Code Enforcement and the President of the Borough Council to which Mr. Groce admitted that he was both an elected member of the Borough Council and an employee of the Borough. The law in Pennsylvania, 65 P.S.13 provides:

"No member of said councils shall hereafter hold any office or employment in the choice of said councils during the term for which he shall have been elected."

The Respondent's argument that the statute does not cover a small municipality overlooks that the Commonwealth Court itself held in **Appeal of Swigart,** 117 Pa. Cmwlth. 84, 544 A.2d 74 (1988) that municipal adjudication bodies must avoid unnecessary conflicts and commingling of incompatible functions. In **Appeal of Warminster Township,** 56 D. & C. 2d 99 (C.P. Bucks Co. 1971), the court pointed out that it is against the public policy of this Commonwealth for an officer with the power of an appointing official to appoint himself to a compensable position. In this case, the appointment was not made by any resolution or action of the Borough Council. Such an event must strictly be construed according to law and the explicit direction of the Pennsylvania legislature. Even if an exception were to be found, the appointment itself was not a legally valid appointment because there is no written record of the appointment in the Minutes of the Borough Council Meetings. Nor is there any record of seeking a special dispensation from the County Court for such an appointment.

Just as in the companion case, this motion was dismissed

because the trial judge thought it was filed too late, although Pennsylvania criminal procedure requires that all pretrial motions be decided before the trial. Since this was not a mere procedural issue, it was fundamental error for the trial court to dismiss the petitioner's motion, particularly without considering the merits and the fact of timely notice of appeal.

(ii) The petitioner was denied due process of law guaranteed to him U.S. Const., Amend. 14 when he was prosecuted by the respondent Borough under its own ordinance for designated offenses as misdemeanors which he did not commit. Although no written motion addressing this point was filed, the petitioner's lawyer brought it up at the beginning of the hearing on February 25, 2003. He asserted that the ordinance of the Borough was legislatively defective and inoperative in this instance in that summary citations of this kind were not authorized under the Borough's Code. The trial court brushed this issue aside on the ground that many municipal governments do not write their ordinances properly. Invoking the severability provision of the ordinance, he went ahead with the hearing anyway. The Commonwealth Court disregarded the Borough's Ordinance that made the violations as "misdemeanors". Instead it affirmed the lower court's abuse of discretion in interpreting away the problem in a defective law and legislating ad hoc for the Borough of Modena and finding the petitioner guilty on not one but fourteen summary citations for one and the same offense pertaining to the same property and against one and the same petitioner under an ordinance which did not authorize such summary citations contrary to Pennsylvania's own Borough Code.

Thus there is a clear conflict between Pennsylvania law and the Borough Code and the trial judge exceeded his authority and abused his discretion in interpreting away the conflict. It is elementary that prosecution under an illegal or defective state statute is void. Lawrence et al. v. Texas, 539 U.S. 558, 125 S.Ct. 2412, 156 L.Ed.2d 508 (2003). Prosecutions under an illegal or defective municipal ordinance are void by analogy.

There is no dispute that the Borough Ordinance under which petitioner was prosecuted was defective and void. Under Section 3301 of the Pennsylvania Borough Code, 53 P.S. 48301 the violation of a municipal ordinance can result in no more than a summary conviction. Moreover, had misdemeanors been charged as mandated by the Borough Code pursuant to the Borough Ordinance, but contrary to Pennsylvania law, petitioner would have been entitled to a jury trial. Accordingly, the ordinance of the Borough of Modena should have been found to be unenforceable against the petitioner. If the ordinance could be judicially amended, enforced and penalty raised ten fold, it follows then that the petitioner should have had the benefit of a trial by jury. If excessive and unreasonable fines are enhanced and imposed (from $1400 to $14,000) arbitrarily, then the petitioner should not be subject to the restriction by the State of Pennsylvania on the availability of jury trial in summary offenses as a protection against judicial bias. See **Blakely v. Washington,** 124 S. Ct. 2531,159 L.Ed.2d 403 (U.S. 2004) wherein it was held that the Sixth Amendment right to trial by jury is no more procedural formality, but rather, is a fundamental reservation of power in our constitutional structure, meant to ensure the people's ultimate control in the judiciary. 124 S. Ct. at 2538, 2539.

If an ordinance has not been validly enacted, it leads to arbitrary and selective enforcement. Municipal ordinances which are oppressive on their face are unconstitutional in violation of the Fourteenth Amendment. See **Lawton v. Steele,** 152 U.S. 133, 14 S. Ct. 499, 38 L.Ed. 385 (1894). In **Fuentes v. Shevin,** 407 U.S. 67, 92 S.Ct.1983, 32 L.Ed.2d 556 (1972) it was held that prohibition against deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

Under U.S. Const., Amend. 14, Pennsylvania may not authorize deprivation of protected liberty or property interest without providing procedure in connection with that deprivation that meets the requirements of due process. **Sample v. Diecks,** 885 F.2d

1099 (3d Cir. 1989). In petitioner's case, there was no dire necessity and the actions of the Borough were not calculated to alleviate or prevent a danger to the health and safety of any one. Under Pennsylvania law, 18 Pa.C.S. 312, de minimis offenses which do not cause any harm to society are not to be subjected to penalties. Here the penalties in the sentence were enhanced ten-fold. [The fire that occurred was not a result of any building code violation, but a direct result of the negligence and carelessness of the parents of the two children. It was so found by the investigating authorities].

B. SIXTH AND EIGHTH AMENDMENT VIOLATIONS

As set forth previously, the protection afforded by the Bill of Rights of U.S. Const. must be provided by the States under U.S. Const., Amend. 14. Klopper v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967) and other cases cited, supra.

The trial court upon appeal from minor judicial court apparently arbitrarily increased the fines from $100 to $1000 on each citation for a total increase of from $1400 to $14,000. It is doubtful that a jury would have found any aggravating circumstances appropriate for such an increase over the fine. Pennsylvania Law at 18 Pa.C.S.#312 provides:

"(a) General Rule – The court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the conduct of the defendant:
(1) was within a customary license or tolerance, neither expressly negatived by the person whose interest infringed nor inconsistent with the purpose of the law defining the offense;
(2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or

(3) presents such other extenuation that it cannot reasonably be regarded as envisaged by the General Assembly or other authority in forbidding the offense."

In Commonwealth v. Moll, 375 Pa. Super. 147, 543 A.2d 1221 (1988), the court pointed out that de mimimis section 312, 18 Pa.C.S. was intended to apply "where no harm occurs either to the victim or to society, generally." The alleged offenses in the cases at bar were "too trivial to warrant condemnation of conviction" or hefty penalties as imposed upon the petitioner. Even if the court were to impose a fine, it should have been limited to one and only one citation because of the same defendant, same property, same circumstance and same situation. Commonwealth v. Shull. 811 A. 2d 1 (Pa. Super. 2002).

The fines imposed in this case are excessive in violation of U.S. Const., Amend. 8. Arbitrariness and appearance of impropriety were at a maximum level in the treatment of this petitioner who had acted with reasonable and due diligence and a harmless delay of few days beyond 60 days was due to circumstances beyond his control and met the test of mitigating circumstance which compelled the verdict of "not guilty".

The purpose of the Eighth Amendment was to limit the government's power to punish. See Browning Ferris v. Kelco Disposal, 492 U.S. 257, 267, 109 S.Ct. 2909, 2916, 106 L.Ed.2d 219 (1989). The cruel and unusual punishment clause is self-evidently concerned with punishment with excessive fines. Austin v. United States, 509 U.S. 602, 113 S. Ct. 2801, 125 L.Ed.2d 488 (1993). In U.S. v. Baj, 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998); this Court explained the Excessive Fines clause of the 8th Amendment which prohibits the imposition of excessive fines. Fines are monetary payments imposed as punishment. The penalties in the case at bar certainly qualify. This Court pointed out that the amount of a forfeiture must bear some relation to the severity of the offense it is designed to punish. A standard had not previously been articulated. The Court said (at p.

334 of 524 U.S.):

"We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."

It has been held that the Excessive Fines Clause applies to the States. Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001).

In the case at bar, the petitioners offenses charged were only what the Borough considered slow action to clean up his property after a fire which was not his fault. In the imposition of enhanced fines, it appears that the trial court exceeded the parameters of the Excessive Fines Clause of the 8th Amendment.

If Pennsylvania imposes excessive fines on the petitioner, then it must provide for the trial by jury as required by the U.S. Const., Amend. 6. If petitioner had been allowed a trial by jury, the fact finding process would have been insulated from the posture or personal feeling, animus or bias of the trial judges towards the petitioner or petitioner's father. A jury of petitioner's peers might have found the petitioner "not guilty" resulting in punishment of no fine. If petitioner had to be found guilty because of his association with his father, then the father should have been charged with the citations and not the petitioner. The Commonwealth Court failed to perceive the errors of law and abuse of discretion by the trial court in its ruling. Thus a travesty of justice has occurred here inconsistent with American legal philosophy.

C. DOUBLE JEOPARDY

The Double Jeopardy Clause of U.S. Const., Amend. 5, provides that no one shall "be subject for the same offense to be twice put in jeopardy of life or limb." The constitutionality of the trial court punishing the petitioner for code violations and also holding him in contempt is thrown into doubt by this Court's

holding in, U.S. v. Dixon, et al., 509 U.S. 688, 133 S.Ct. 2849, 125 L.Ed.2d 556 (1993).

This petitioner was subjected to double jeopardy as is apparent from the 8th Amendment violations by the respondent State of Pennsylvania. In U.S. v. Ward, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980), it was held that where a statutory scheme is "so punitive either in purpose or effect as to negate" the civil label, it is deemed criminal for purposes of the constitutional protections.

In United States v. Ogbuehi, 897 F. Supp. 887 (E.D. Pa. 1995), it was held that a civil sanction, such as a forfeiture, which goes beyond remedial purpose and can only be explained as also serving retributive or deterrent purpose will be considered punishment for double jeopardy purposes.

In the case being submitted here there were fourteen citations. In the companion case there were an additional fifty-two citations. All sixty-four prosecutions were essentially for one and same offense against one and the same petitioner flowing from one and the same property. Here it can be inferred that the punishment is not for remedial purpose but for raising revenue for a cash strapped tiny municipality on a selective basis against a person of Asiatic Indian ethnicity based on his national origin.

The Court's attention is drawn to Yates v. U.S., 355 U.S. 66, 78 S.Ct. 128, 2 L.Ed.2d 95 (1957), wherein the Court held it a violation of the Double Jeopardy Clause for a trial court to find eleven different incidents of contempt against a defendant who refused to answer eleven separate questions related to the same general topic on cross examination. This Court will not allow the multiplication of the criminal consequences of several occurrences of what is essentially the same act.

D. DEPRIVATION OF DUE PROCESS

Petitioner was deprived of due process in that required notices by the Borough were defective. For example, it gave only 3 days to correct the demolition of a retaining wall. The notice did not provide for a reasonable time to correct the condition complained of. This was a violation by the respondent Borough (or Pennsylvania) even though Section 106 of the Property Maintenance Code of the Borough of Modena required that notices of violation must provide reasonable time. In Manna v. City of Erie, 27 Pa. Cmwlth. 396, 366 A. 2d 615 (1976) the court held that a property owner must be given with "notice of the action, a copy of the alleged violations, reasonable time to file a written response, and an opportunity for an oral appearance" for a hearing in case of disagreement. No such opportunity was provided. In fact the Borough did not even have a proper office or a secretary or a manager where petitioner or his representative could call or complain. In addition, to consolidate the state proceedings into one case would have lightened the petitioner's burden of defending against the charges and of appealing the convictions, with no detriment to the borough.

It is particularly noteworthy that the petitioner herein who has no prior history of any violation is paying the price of maximum penalties because the trial judge believed in the "small world theory" and that a son "must have known of his father's propensities". It is clear that this was an assumption of the trial court based upon nothing more than mere bias, speculation and surmise as there is no evidence in the record to support this. Petitioner should have been judged on his own merits and not penalized because of who his father is. This question involves an issue of immediate importance in that each citizen must be adjudged for who he or she is and not for the actions of the other members of his family. It is evident that the trial judge penalized the petitioner because of previous experience with his father.

CONCLUSION

For the reasons outlined above, Petitioner requests that the petition for the writ of certiorari be granted or this Court may summarily reverse and remand.

Respectfully submitted,

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APPENDIX A

ORDERS AND OPIONS OF COURTS

ORDERS OF THE SUPREME COURT OF PENNSYLVANIA

No. 301 MAL 2004

Per curiam

AND NOW, this 14th day of October, 2004, the Petition for Allowance of Appeal is hereby denied.

APPENDIX B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania,	:	
v.	:	No. 1536 C.D. 2003
Adhinayak Roby Lal,	:	Submitted: October 10, 2003
Appellant		

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER., Judge
HONORABLE JESS S. JIULIANTE, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER FILED: March 16, 2004

Adhinayak Roby Lal (Appellant) appeals from orders of the Court of Common Pleas of Chester County finding him guilty of violations of the Borough of Modena's (Borough) property maintenance code. By order dated February 25, 2003, the trial court found Appellant guilty of fourteen housing code violations and assessed a $1000 fine plus costs for each violation. By opinion of April 9, 2003, the court denied Appellant's motion for reconsideration.[1]

[1]Appellant raises the following questions: (1) whether the trial court erred by denying his motion to dismiss the charges because they were improperly brought by a Borough code officer who was also the elected Borough council president; (2) whether the trial judge erred by not recusing himself when he had a long history of adjudicating issues involving Appellant's father and had developed a demonstrable bias; (3) whether the court erred by conducting a hearing when notice was defective and when the municipal ordinance under which Appellant was charged classified the violations as misdemeanors and Pennsylvania law only allows such violations to be tried as summary offenses; (4) whether the court erred by imposing costs for each citation when the Rules of Criminal Procedure permit costs to be imposed with respect to only one proceeding; and (5) whether the fines were excessive in view of Appellant's good-faith efforts to comply with the Borough's requirements and the de minimis nature of the offenses.

Appellant, a physician, owns property at 19 Mortonville Road in the Borough. Dr. Amrit La! is Appellant's father and manages Appellant's property pursuant to a power of attorney. On December 16, 2001, Edwin Groce, a Borough code officer and also the Borough council president, met with Dr. Amrit Lal and inspected Appellant's property, pointing out several violations of the Borough's property maintenance code relating to trash and unsafe conditions and requesting that the violations be corrected.[2] On December 29, 2001, a building on the property burned down. At the time of the fire Appellant had not yet corrected the cited violations, and in January 2002 Appellant was notified of the continuing violations and of the need to demolish the destroyed building.

By letter dated February 3, 2002, Groce notified Appellant that pursuant to Section 108.1 of the Borough's maintenance code, he had fifteen days in which to submit to the Borough a contract for demolition of the destroyed building and clean-up of the property. The notice stated that Appellant had twenty days in which to appeal and that Groce had personally delivered a copy of the notice to Dr. Amrit La!. A second copy of the notice was sent by certified mail and was received by Appellant on February 12, 2002. On or about February 10, 2002, Groce posted a demolition notice at the property stating that Appellant had fifteen days to submit a demolition contract to the Borough and sixty days to complete it.

In March 2002 Dr. Amrit La! received an estimate and a proposed contract for the demolition and clean-up from Anthony Formica, owner of the A.S.

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[2] January 2001, by Ordinance No. 117, the Borough council adopted as its maintenance code the International Property Maintenance Code (BOCA) as published by the International Code of Councils, Inc. Section 103.6 of the maintenance code provides for fines of between $100 and $1000 for each day that a violation continues after the Borough has notified the landowner of the violation. Section 107.2 requires the Borough to give the landowner a reasonable time to correct any violations.

Formica Co. Dr. Amrit Lal sent the contract to the Borough for its approval, but the contract was not signed or otherwise concluded and the Borough took no further action. Formica contacted Groce concerning Borough requirements for demolition permits, and he informed Groce that he had not yet received a signed contract from Dr. Amrit Lal. By April 2002 the building had not been demolished and the other violations had not yet been corrected; consequently, from April 3 - 18, 2002 Groce issued fifteen citations for Appellant's failure to comply with the demolition order and to correct the other violations. The citations were filed with the local district justice on April 19, 2002. Formica began demolition of the building on May 10 and thereafter completed a partial clean-up.

On September 17, 2002, the district justice found Appellant guilty of each violation and assessed a fine of $100 plus court costs for each violation. At the February 25, 2003 *de novo* hearing, counsel for Appellant presented a motion to dismiss all of the charges asserting that because Groce was the elected Borough council president he was prohibited from acting also as a code enforcement officer pursuant to Section 1104 of The Borough Code, *as amended*, 53 P.S. §46104.[3] The trial court denied the motion as untimely; however, testimony established that Modena had a population of only 610 and therefore that Groce could properly

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[3]The Borough Code was enacted by the Act of February 1, 1996, P.L. (1965) 1656, *as amended*, 53 P.S §§45101 - 48501. Section 1104 provides, in relevant part:

> Unless there is incompatibility in fact, any elective or appointive officer of the borough shall be eligible to serve on any board, commission, bureau or other agency created by or for the borough, or any borough office created or authorized by statute and may accept appointments thereunder, but no mayor or member of council shall receive compensation therefor. No elected borough official of a borough with a population of 3,000 or more may serve as an employe of that borough. Where there is no incompatibility in fact, and subject to the foregoing provisions as to compensation, appointees of council may hold two or more appointive borough offices....

serve simultaneously as council president and as code enforcement officer. After hearing testimony from Groce, Formica and Dr. Amrit Lal, the court found Appellant guilty of fourteen of the citations and imposed a $1000 fine plus costs for each violation. Thereafter, the court denied Appellant's petition for reconsideration, explaining that Appellant could be held liable for the acts of his father as agent; that Appellant's violations were of a continuing nature and the Borough could issue continuing citations; that Appellant failed to act in a reasonable time to abate the violations or to demolish the building because Dr. Amrit Lal wanted to maintain a "memorial" to the two children who died in the fire; and that the fines were based on a totality of the agent's conduct.[4]

Appellant first argues that the trial court erred when it denied Appellant's motion to dismiss the charges when the motion was presented prior to the hearing to Borough counsel and when Section 1104 of The Borough Code, 53 P.S. §46104, prohibited Groce from issuing the citations. The decision to grant
or to deny a defendant's motion to dismiss prior to hearing is within the sole discretion of the trial court, and its decision will not be disturbed absent an abuse of discretion. Commonwealth v. Moore, 756 A.2d 64 (Pa. Super. 2000). At the time Appellant's counsel presented the motion, witnesses for Appellant and the Borough had already assembled and were prepared to testify; Appellant did not appear. Under these circumstances, the court's denial of the motion did not constitute an abuse of discretion. In any case, the motion lacked merit since the evidence established that the Modena population was less than 3000, and therefore under Section 1104 Groce was permitted to act both as Borough council president and as a code enforcement officer. See supra n3. No evidence was introduced to suggest that Groce otherwise violated Section 1104 or any other Code provision.

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[4]This Court's review here is limited to determining whether the trial court committed an error of law, made necessary findings unsupported by substantial evidence or committed an abuse of discretion. Commonwealth v. Snyder, 688 A.2d 230 (Pa. Cmwlth. 1996); De Cray v. Zoning Hearing Bd. of Upper Saucon Township, 599 A.2d 286 (Pa. Cmwlth. 1991). An abuse of discretion is not merely an error in judgment; one must show that the trial court misapplied the law or that the judgment exercised was unreasonable or the result of bias, prejudice or partiality. Commonwealth v. CSX Transportation, Inc., 653 A.2d 1327 (Pa. Cmwlth. 1995).

Appellant next argues that the trial judge, the Honorable Thomas G. Gavin, should have sua sponte recused himself because of prior rulings in cases involving Dr. Amrit La! and the judge's appearance of bias or demonstration of actual bias against Appellant and his family. No recusal motion was presented to the judge, and for that reason the issue has been waived. See Commonwealth v. Boyd, 835 A.2d 812, 820 (Pa. Super. 2003) ("It is well-settled that a party seeking recusal or disqualification must raise the objection at the earliest possible moment, or the, party will suffer the consequence of being time barred.") (quoting Commonwealth v. Stafford, 749 A.2d 489, 501 (Pa. Super. 2000)).

Appellant also maintains that the trial court should not have conducted a hearing on the charged violations when Ordinance No. 117 referred to them as misdemeanors, and violations of municipal ordinances may only be prosecuted as summary offenses. Appellant is correct that under Section 3301 of The Borough Code, 53 P.S. §48301, the violation of a municipal ordinance can result in no more than a summary conviction. It is also true that Section 106.3 of the Borough's maintenance code erroneously referred to violations of code as being misdemeanors and that the court reviewed the proceedings with Appellant, exercised the severability clause under Section 101.4 and substituted the proper summary classification for the violations. Section 3301 of The Borough Code declares, inter a/ia, that violations of a borough ordinance are summary offenses and shall be brought before "any justice of the peace of the borough." As the proper procedures were followed, including adequate notice, Appellant was not denied due process.

Appellant next asserts that the trial court erred in imposing court costs on each citation when the Rules of Criminal Procedure and case precedents allow for only one set of costs to be imposed. Appellant cites Commonwealth v. Snyder, 560 A.2d 165 (Pa. Super. 1989), and Commonwealth v. Shull, 811

A.2d 1 (Pa. Super. 2002), appeal denied, 572 Pa. 756, 818 A.2d 504 (2003), as support. In Snyder the defendant was charged with multiple violations related to driving under the influence and driving without a license resulting from a single traffic stop. The charges were presented in two criminal complaints filed nine months apart. The court denied the defendant's motion to dismiss the second complaint, explaining that under Rule 13 1(b) and (c), Pa.R.Crim.P. 13 1(b), (c) (now Rule 505(b) and (c)), the defendant was entitled to have the charges presented in a single complaint and that the proper remedy was to disallow costs on the second one. Similarly, Shull involved multiple summary and misdemeanor offenses arising from a single altercation between two motorists. Two complaints were filed and prosecuted before different district justices. The court again noted that defendant was only entitled to relief from the second set of costs under Rule 505(b) and (c).

Neither Snyder nor Shull applies to these proceedings. Pa 453(b) provides that " more than one summary offense is alleged to have been committed by one person arising from the same incident, the matter shall proceed as a single case and the issuing authority shall receive only one set of costs." In this case, however, the trial court was presented with ongoing violations of a municipality's property maintenance code, resulting in multiple citations issued on separate dates and multiple summary convictions at the distinct justice and the trial court levels. The incident resulting in each violation was not simply the physical conditions of the property discovered to be in violation of the ordinance, but rather it was the continuing, daily failure to correct the violations. The trial court therefore properly imposed costs on each of the fourteen citations.[5]

Finally, Appellant essentially argues that the trial court abused its discretion by imposing the maximum fine of $1000 for each violation and ignoring Appellant's good-faith efforts to comply with the Borough's directives. Sentencing is within the

discretion of the trial judge and absent an abuse of discretion, this Court will not disturb the trial judge's exercise of discretion. Borough of Kennett Square v. La!, 643 A.2d 1172 (Pa. Cmwlth. 1994). In formulating a sentence, the trial court should weigh all mitigating and aggravating factors, including the degree of actual or potential harm to the public, the gravity of the offense and the history and character of the defendant. Id. The trial judge explained the reasons of or the maximum fines, citing the danger to the community, the Borough's efforts to secure compliance and Dr. Amrit Lal's failure to act within a reasonable time due in part to his decision to allow a "memorial" to the deceased children. Although significant, the Court cannot say that the fines are so excessive that they constitute an abuse of the trial judge's discretion. Finding no reversible error, the Court accordingly affirms the orders of the Trial Court.

DORIS A. SMITH-RIBNER, Judge

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[5] Section 1725.1 of the Judicial Code, as amended, 42 P& C.S. § 1725.1, provides that "the costs to be charged by the minor judiciary or by the court of common pleas where appropriate in every criminal case ... shall be as follows: (1) Summary conviction, except motor vehicle cases

APPENDIX C

IN THE COURT OF COMMON PLEAS OF
CHESTER COUNTY, PENNSYLVANIA

MAR -7 2003

COMMONWEALTH OF PENNSYLVANIA, BOROUGH OF MODENA	•	
Plaintiff	•	CRIMINAL DIVISION
vs.	•	CASE NO. 5556-02 through 5568-02 and 36-03, 37-03
ADHINAYAK RODY LAL	•	
Defendant	•	

ORDER

AND NOW, this 25th day of February, 2003, after trial de novo in the above captioned Summary Appeal before this Honorable Court, it is hereby ORDERED and DECREED that Defendant, ADHINAYAK RODY LAL is found guilty of violations of Borough Municipal Code Ordinance number 117, section 110 et seq. and 305 et seq., and is ORDERED to pay fines in the amount of $1,000.00 per violation ($14,000.00 total) plus the court costs.

Citation number 1 P 1200215-2, appearing at 5559-02 is hereby withdrawn by the Borough of Modena.

BY THE COURT:

THOMAS G. GAVEIN J

2003 MAR -4 A 9:25
CLERK OF COURTS
CHESTER CO. PA.

COMMONWEALTH OF PENNSYLVANIA: IN THE COURT OF COMMON PLEAS

: CHESTER COUNTY, PENNSYLVANIA

-vs-

: NOS. 5556-02 - 5568-02; 36-03 - 37-03

ADHINAYAK ROBY LAL : CRIMINAL ACTION

CLERK OF COURTS
CHESTER CO., PA.
2003 SEP -9 A 8:03

O P I N I O N

BACKGROUND

This writer is a firm believer in the "small world" theory and "the more things change, the more they remain the same." Dr. Amrit Lal is well known in the community, the Court of Common Pleas of Chester County and both the Superior Court and Commonwealth Court of Pennsylvania for his tenacity in defending against municipal code violations. This information is provided simply to set the tone, i.e., that Adhinayak Roby Lal MUST HAVE KNOWN of his father's propensities simply from what appears in the general media, if not from having lived with him through the many years of litigation in which he has engaged.

DISCUSSION

Dr. Adhinayak Lal sought reconsideration of the sentence imposed upon him as a result of various housing code violations in the Borough of Modena, Chester County, Pennsylvania. Dr. Adhinayak Lal first asserts in the Petition for Reconsideration that he was, "held responsible for the actions of Amrit Lal which were done without his knowledge." The record establishes that Dr. Adhinayak Lal gave his father a Power of Attorney over the property and thus, in my

view, ceded management of same to his father. As previously indicated, his father's reputation re property management is well known. A principal is liable for the actions of his agent undertaken in the scope of the principal's business. Clearly, Dr. Amrit Lal was acting within the scope of his management duties at all times material to these proceedings and therefore his son, as principal, is liable for his father's actions. If Dr. Adhinayak Lal was ignorant of his father's actions, that ignorance is not a defense.

Another reason given for reconsideration is that the borough cited the "same underlying violations on a daily basis." A municipality has the choice in the face of a continuing violation of either looking the other way or citing on a recurring basis. As the violation is a recurring one, so too should be the citations. I hasten to point out that the record established that the borough went through the usual ritual with Dr. Amrit Lal of affording multiple opportunities to cure the defects BEFORE CITATIONS WERE ISSUED. Accordingly, this averment provides no basis for reconsideration.

Grounds C and D can be considered together as they essentially go to the issue of the fine imposed and the reason for the fine. The record more than adequately establishes the physical condition of the property and the danger it presented to the community. The record also establishes the efforts the borough made to effectuate the necessary remedial action and the utter failure of Dr. Amrit Lal to act reasonably within a reasonable time frame. In fact, Dr. Amrit Lal had the gall to assert that the premises were not taken down in a more timely fashion as the ruined building was, "a memorial" to the persons who had died therein. Using a tragic

connection with property clean up, which is the subject of the this action. The Borough of Modena, its agents, servants and workmen are to account to this Honorable Court for all sums spent in connection with the clean up and rendering safe of the premises known as 19 Mortonville Road, Modena Borough, Chester County, Pa. The balance of the $5,000.00, if any, shall be returned to the Clerk of Court's account.

The escrow account established by the Clerk of Courts shall be interest bearing, if possible, with interest to the prevailing party. It is understood that if, after thirty (30) days, from January 16, 2003, no appeal is filed by the Defendant, the balance of the account shall be released to the Borough of Modena to apply against the outstanding balance of fines, court costs, and interest that may be due to the Borough of Modena. At the time the balance of funds are released, an accounting shall be rendered to the Defendant to indicate what, if any, additional fines and court costs he may owe.

If the Defendant prevails, then the balance of the Clerk of Court's escrow account shall be released to the Defendant, less the sums subtracted by the Borough of Modena for clean up as aforementioned.

BY THE COURT:

THOMAS G. GAVEIN J

APPENDIX D:
CONSTITUTIONAL AMENDMENTS

AMENDMENT V:

No person shell... be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

A. Roby Lal, Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
(BOROUGH OF MODENA), Respondent

PROOF OF SERVICE

Thomas R. Kellogg, Esquire, a member of the Bar of the Supreme Court of the United States, hereby certifies that on 7th day of May, 2005 he caused to be served by United States first class mail, postage prepaid, three copies of the Petition for a Writ of Certiorari in this matter to the attorney for Respondent at the address set forth below:

Hudson L. Voltz, Esquire
525 Highlands Blvd.
Coatesville, Pa. 19320-5810
(610) 466-9500

This satisfies the requirements of Supreme Court Rule 29(3).

Thomas R. Kellogg, Esquire
Strong Stevens and Wyant
1250 W. Germantown Pike, Suite 300
Plymouth Meeting, Pa. 19462-2444.